76-5167

Supreme Court of the United States

October Term, 1976
No. _____

LUCIO P. SALVUCCI — Petitioner

versus

THE NEW YORK RACING ASSN., INC. et al — Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LUCIO P. SALVUCCI
746 Commercial Street
Weymouth, Mass. 02189

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TABLE OF CASES AND AUTHORITIES

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976
NO._____

LUCIO P. SALVUCCI *Petitioner*
Pro Se

versus

THE NEW YORK RACING ASSN., INC. *Respondent*
et al

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Petitioner, Lucio P. Salvucci, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in this case on April 21, 1976.

OPINIONS BELOW

The opinion of the Court of Appeals has been officially or unofficially reported and is appended hereto.

JURISDICTION

Under the Statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question is Appeals (Section 38 (117) of Title 17 USC).

The United States Court of Appeals for the Second Circuit ordered dismissed and entered on April 21, 1976. (A. 6a, 7a)
A petition for a re-hearing to the United States Court of Appeals for the Second Circuit was filed May 3, 1976 and denied July 16, 1976. (A. Pg. 8a)

The Statutory provision believed to confer on the court jurisdiction to review the judgment or decree in question is Appeals (Section 38 (114).

QUESTIONS PRESENTED

1. Whether Petitioner was denied his constitutional guarantee of his copyrights (Class A Books) under Article I Title 17 USC § 101 infringement because the Eastern District Court of New York in the First Instance, and the Circuit Court of Appeals for the Second Circuit has decided a federal question in a way in conflict with the applicable decisions of this court.

2. Whether Petitioner was denied his constitutional guarantee of his copyrights under Article XIV Section I by being denied his property right without due process and also being denied his rights of equal protection of the laws.

CONSTITUTIONAL PROVISIONS

A. Title 17 USC
Sections 5, 101.

1. Section 5 Classification of Copyrighted works.

2. Section 101 involves infringement of copyright; if any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable.

B. XIV Amendment

Section I Constitutional guarantee of the due process and equal protection of the laws.

STATEMENT OF THE CASE

Petitioner states that under the Copyright Act of 1790 the Congress of the United States was given the power to render exclusive rights for a limited time to authors for their writings. This right allows solely to the author the right to print, reprint, publish, copy, vend, and translate into other languages and dialects, or make any other version thereof, and prohibits any one else from doing the same without permission.

The petitioner filed a complaint in the United States District Court for the Eastern District of New York on July 31, 1975 alleging copyright infringement of his copyrights by the respondents in their use of similar wager offerings for parimutuel betting at horse racing establishments in New York.

The respondents moved to dismiss the complaint pursuant

to Rule 12 (b) (6) of the F.R.C.P. for failure to state a claim upon which relief can be granted. Said motion was granted by the trial court stating: (1) "The court finds no genuine issue of fact exists since plaintiff's method of expression was never employed by respondents. The limited copyright of the expression of the methods of betting was not infringed."

(2) Respondent's motions are in all respects granted. (A. Pg.5a). Under (1) above the petitioner's valid copyright is acknowledged by the court and as such a valid show cause is present. However, under (2) above the Court allowed all the motions of the respondents; granted, even though the F.R.C.P. Rule 12 (b) (6) concerns a no show cause which is in conflict with the affirmed valid copyright of which a legitimate show cause of (1) above is presented.

Because of this conflict of statements by the District Court this court should correct this manifest error.

The U S Court of Appeal for the Second Circuit on April 21, 1976 on appeal from a judgment of the U S District Court for the Eastern District of New York affirmed the District Court's decision. (A. pg. 6a, 7a). By so doing there attaches to itself all the above petitioner's statements and reasons of conflict and error within the District Court's decision. They too are in manifest error and should be corrected by this court.

It has long been established by the many applicable decisions of this court that access admitted, similarity admitted, parallelism of similarities of the original, and the alleged infringing work, that copying by paraphrasing is present.

The copying that is present here was made possible by The

New York Racing Association, Inc. having access to the copyrighted works and by admittedly studying and "discussing them in detail." There can be no acceptable denial from respondents of the opportunity of having access to these copyrighted works and of using the opportunity which was presented to them through the meeting and subsequent communications of 1963. (A. Pg. 1a).

Ten years later, in 1973, by paraphrasing the petitioner's copyrighted work, The New York Racing Association, Inc. put into use a new form of wager offering for pari-mutuel betting entitled Triple which is saying the exact same thing as the original copyrighted wager offerings Tri-3 and Tri-3 Double copyrighted in 1962; thereby infringement is present, paraphrasing not being legal under federal law. Under the XIV Amendment the petitioner was deprived his property right without due process of law, and also was denied his equal protection of the laws in relation of Title 17 USC § 101.

In 1974, while Thomas J. Meskil was Governor of Connecticut, the petitioner wrote to him concerning his several copyrighted works on multiple exotic type forms of pari-mutuel wagers. On October 11, 1974 the then Governor Meskil wrote to the petitioner and as a result of that communication a meeting was arranged between the petitioner and John MacDonald, Executive Secretary of the State of Connecticut Commission on Special Revenue, which meeting was kept.

The petitioner submits that since it was this same Thomas J. Meskil who presided as one of the three judges in the petitioner's appeal to the United States Court of Appeals of the Second Circuit, that a probable conflict of interest existed from which

the petitioner was denied his property right without due process and was also denied his rights of equal protection of the laws under the XIV Amendment.

REASONS FOR GRANTING OF THE WRIT

The petitioner, through council, in the First Instance, by virtue of his original writing, made it known, that by adhering to the Copyright Act of 1790 allowing authors exclusive rights for their writings, and by following all Statutory requirements of the Copyright office regarding the Copyright Act of 1909 Title 17 USC, from which a Certificate of Copyright was issued to petitioner, a prima facie case of copyright was established.

The decisions of the U S District Court for the Eastern District of New York and the U S Court of Appeals for the Second Circuit are clearly in conflict and in manifest error. The District Court stated and was affirmed by the Court of Appeals that because the respondents did not employ the petitioner's method of expression the limited copyright of the petitioner's expression was not infringed. This reason for dismissal clearly involves a federal question in a way which is in conflict with applicable decisions of this court and should be reversed.

In Bradbury v. Columbia Broadcasting System Inc. D.C. Cal. 1959 174 F. Supp 733, Reversed on other grounds 287 F. 2d 478 Certiorari Dismissed 82 S. Ct. 19, 383 U.S. 801, 7L Ed. 2d 15. Access alone means nothing, but where access to copyrighted material is shown, the probability of copying is high. Also, from the letter received by the petitioner from the respondents July 19, 1963 there exists no coincidence

in the respondents wager offering Triple and the petitioner's copyrighted works Tri-3 and Tri-3 Double.(A. pg. 9a, 10a).There does exist not only verifiable and unrefutable access, but also substantial similarity.

It is a fact that the respondents had access to the petitioner's copyrighted works and therefore had reasonable opportunity to view, review, and study the works, and did so by admittedly stating they "studied in detail" the copyrights involved. (Letter A. pg. 1a).

Also in the respondent's memorandum in support of their motion for summary judgment "It is obvious that plaintiff's copyrighted works, the Tri-3 describes, albeit in the most rudimentary detail the form of wager known in New York both as the Triple or Trifecta" admits to similarity and when combining the letter of access of July 19, 1963 and the parallel similarities, there is strong evidence of infringement present.

Copying by paraphrasing may occur even where there is little or no identity of language between the respective passage, Id. In copyright law paraphrasing is equivalent to outright copying Donald v. Zack Meyer's T.V. Sales & Service C.A. Tex. 1970, 426 F. 2d 1027, certiorari denied 91 S. Ct. 459, 400 US 992, 27 L Ed. 2d 441. Paraphrasing or copying of copyrighted work with evasion is infringement even though there may be little or no conceivable identity between subsequent work and original work. Addison-Wesley Pub. Co. v. Brown, D.C. N.Y. 1963, 223 F. Supp 219. By paraphrasing the petitioner's copyrighted works the respondents are saying the same thing as the petitioner's.

Where a study of two writings reveals that one of them is not in fact the creation of putative author but instead has been copied in substantial part exactly or in transparent re-phrasing to produce essentially the story of other writing, there has been an infringement of the copyright. Warner Bros. Pictures v. Columbia Broadcasting System, C.A. Cal. 1954, 216 F. 2d 945, certiorari denied 75 S. Ct. 532, 348 U.S. 971, 99 L. Ed. 756.

"Infringement" occurs when an accused work is a colorable copy or paraphrase of the copyrighted work, but the copying must be visible by the ordinary observer and must be of a substantial portion of the protected work. Berlin v. E. C. Publications, Inc. D.C. N.Y. 1963. 219 F. Supp. 911. affirmed 329 F. 2d 541, 9 A.L.R. 3d 612. certiorari denied 85 S. Ct. 46, 379 U S 822. 13 L.Ed. 2d 33.

"Copying" involves use of an original work so as to produce a work so near to the original as to give every person seeing it the idea created by the original. Richards v. Columbia Broadcasting System, Inc., D.C.D.C. 1958. 161 F. Supp. 516.

Furthermore, under Article XIV § 1 Constitutional guarantee is deprived the petitioner his literary property without due process of the law because of the existing conflict of interest, decisions of the courts, and also denying his equal protection of the laws by deciding a federal question in a way that is in conflict with applicable decisions of this court.

Thus the questions involved in this case are whether (1) Is there any similarity between the earlier work and the later one? (A. pg. 9a, 10a). (2) Is the similarity the result of copying by paraphrasing? (A. pg. 1a). (3) Has a material or substantial part of the original been copied? (A. pg. 9a, 10a). (4) Was the original writing duly copyrighted? (A. pg. 9a, 10a). (5) Has there been admittance of similarities of both works by the respondents? (Pg. No. 7). (6) Was the petitioner denied his constitutional guarantee from due process under Article XIV § 1 and was he denied his rights of equal protection under the laws?

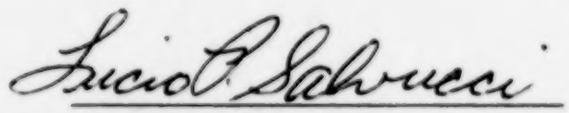
All the above questions are answered in the affirmative.

The copying, by paraphrasing, that is present here was made possible by The New York Racing Association, Inc. having access to the copyrighted works and by admittedly studying and "discussing them in detail" (A. pg. 1a). and by also admitting similarities. (Pg. No. 7). There can be no denial from respondents of the opportunity of having access and of using the opportunity which was presented through the meeting and subsequent communications of 1963.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petitioner for a Writ of Certiorari be granted

Respectfully submitted,



746 Commercial Street
Weymouth, Mass. 02189

LUCIO P. SALVUCCI
Pro Se

CERTIFICATE OF SERVICE

I, LUCIO P. SALVUCCI, Pro Se, Petitioner, hereby acknowledge that on OCT. 13, 1976 , I mailed a copy of the herein enclosed writ of certiorari to the United States Supreme Court through the U.S. Postal Service, postage prepaid, to the following:

Bauer, Amer & King, P.C.
114 Old Country Road
Mineola, New York 11501

Cahill Gordon & Reindel
Eighty Pine Street
New York, N.Y. 10005

W. Bernard Richland
Municipal Building
New York, N.Y. 10007

Lucio P. Salvucci

LUCIO P. SALVUCCI *Pro Se*

746 Commercial Street
Weymouth, Mass. 02189

APPENDIX

NYRA

THE NEW YORK RACING ASSOCIATION, INC. JAMAICA 17, LONG ISLAND, NEW YORK
Director of Mutuel Department

July 19, 1963

Mr. Lucio P. Salvucci
746 Commercial Street
E. Weymouth, Mass. 02189

Dear Mr. Salvucci:

I have your letter of July 12, with reference to our meeting on June 13, at which time you showed me several copyrighted new types of wagering which we discussed.

I have taken these up in detail with the President and Vice President of our Association and we are not interested in using any of these types of wagering in the immediate future.

If you desire the return of the copies you left with me, kindly advise me and I will forward same to you immediately.

Yours sincerely,

L. M. Walger

Aqueduct *Belmont Park* *Saratoga*

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

LUCIO P. SALVUCCI — 75 C 1236

Plaintiff,

- against -

THE NEW YORK RACING ASSN., INC., NEW YORK CITY OFF-TRACK BETTING CORP.; ROOSEVELT RACEWAY, INC.; and JOSEPH A. GIMMA, AS HE IS CHAIRMAN OF THE NEW YORK STATE RACING COMMISSION.

Defendants.

Memorandum or Decision and Order

December 2, 1975

MISHLER, CH. J.

Defendants, New York Racing Association, Inc. (NYRA), Roosevelt Raceway, Inc. (Roosevelt), and Joseph A. Gimma, move for summary judgments, Rule 56 (F.R. Civ.P.).[1]

[1] All the motions seek alternative relief under F.R.C.P. 12(b) (6), i.e., to dismiss the complaint for "failure to state a claim upon which relief can be granted." All the parties, with the exception of Gimma, submitted affidavits.

Plaintiff alleges four counts of copyright infringement; each separately directed against one of the four defendants. He claims that he is the owner of copyrighted works registered in the office of the Register of Copyrights on April 2, 1962, as Tri-3 Double and Tri-3.[2]

Pari-mutuel betting is controlled by statute in New York State – N.Y. Unconsolidated Laws, §§7952, 7954 and 8008. Methods of betting at authorized establishments are sanctioned by the New York State Racing and Control Board. In addition to conventional betting at thoroughbred and harness race tracks, the Board has approved the Daily Double, Quinella, Exacta, Trifecta (sometimes called the triple), and Superfecta.[3]

[2] The copyrighted works consist of methods of betting. The methods as described in the certificate of registration are appended to this memorandum of decision and order.

[3] In the Daily Double, the bettor must select the winner in each of two designated races.

In the Quinella, the bettor must select the two horses in each of two designated races that finish first and second.

In the Exacta, the bettor must select the first two horses in their actual order of finish in the designated race.

The Tri-Fecta (Triple) is a variation of the Exacta. The first three horses in the designated race must be selected in their actual finish.

The Superfecta is a further variation of the Exacta: the first four horses are selected in their order of finish.

The method of betting is not copyrightable. Novel and useful ideas may attain patent protection, but not copyright

protection. In Baker v. Selden, 101 U.S. 99 (1880), plaintiff obtained a copyright on a book explaining a system of bookkeeping. The court dismissed the claimed copyright infringement noting:

> *There is no doubt that a work on the subject of bookkeeping though only explanatory of well known systems, may be the subject of a copyright; but, then, it is claimed only as a book . . . The novelty of the art or thing described or explained has nothing to do with the validity of the copyright. . .*
>
> *. . .The copyright of a book on bookkeeping cannot secure the exclusive right to make, sell and use account books prepared upon a plan set forth in such book. . .101 U.S. at 101-02, 104.*

It is the manner of expressing and not the idea itself which is copyrightable. L. Ratlin & Son, Inc. v. Jeffrey Synder, d/b/a J.S. and Etna Products Co., Inc. No. 75-7308 (2d Cir. October 24, 1975); Roth Greeting Cards v. United Car Co., 429 f.2d 1106 (9th Cir. 1970); Welles v. Columbia Broadcasting System, Inc., 308 F.2d 810 (9th Cir. 1962). The instant copyrights attempt to protect the method of betting and are invalid.[4]

[4] Plaintiff's copyrights were held invalid in Salvucci v. New Hampshire Jockey Club, No. 75-223 and 75-224 (D.N.H. October 6, 1975). The court is advised that the decision is on appeal.

Alternatively, should the complaint be interpreted as an infringement of the expression of the betting method, rather than the method itself, the court finds no genuine issue of fact exists since plaintiff's method of expression was never employed by defendants.

The limited copyright of the expression of the methods of betting was not infringed. Defendants' motions are in all respects granted, and it is

SO ORDERED.

The Clerk of the Court is directed to enter judgment in favor of defendants and against plaintiff dismissing the complaints.

/s/ Jacob Mishler
U.S. D.J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the Twenty-first day of April one thousand nine hundred and seventy-six.

PRESENT:

Honorable Henry J. Friendly
Honorable Paul R. Hays
Honorable Thomas J. Meskill

LUCIO P. SALVUCCI,

Plaintiff-Appellant,

#76-7022

v.

THE NEW YORK RACING ASSOCIATION, INC.; NEW YORK CITY OFF-TRACK BETTING CORP.; ROOSEVELT RACEWAY, INC.; and JOSEPH A. GIMMA, CHAIRMAN, NEW YORK STATE RACING COMMISSION,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court is affirmed on the opinion of Chief Judge Mishler, _____ F. Supp. _____, dated December 2, 1975.

/s/ Henry J. Friendly
/s/ Paul R. Hays
/s/ Thomas J. Meskill

PRO SE UNITED STATES COURT OF APPEALS
7/7/76
76-7022 Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the Sixteenth day of July, one thousand nine hundred and seventy-six.

Lucio P. Salvucci,

Appellant,

v.

New York Racing Ass'n, et al.,

Appellees.

A motion having been made herein by Appellent pro se for rehearing

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

/s/ Henry J. Friendly (by TJM)

/s/ Paul R. Hays

TJM HJF PRH

/s/ Thomas J. Meskill Circuit Judges

TRI-3 Copyrighted 1962

TRI-3 is a 3 finish position play or wager on horses or dogs.

The object is to select correctly all finish positions starting with your first chosen finish position of your TRI-3 ticket.

If no one selects correctly all three finish positions, then the person(s) getting the most consecutive correct finish positions starting with their first chosen finish position of their TRI-3 ticket is the winner.

TRI-3 DOUBLE Copyright 1962

TRI-3 DOUBLE is a finish position play or wager consisting of positions 1, 2, and 3 in two races on horses or dogs.

The object of this TRI-3 DOUBLE is to select correctly the chosen finish positions in both races of the play or wager.

Winning tickets with the correct first three chosen positions (first half of the TRI-3 DOUBLE) must be exchanged for your selections on the second half of the TRI-3 DOUBLE.

The person(s) getting the most consecutive correct finish positions starting with their first chosen finish position on the first half of the TRI-3 DOUBLE ticket will be the winner.

TRIPLE Started 1973

The TRIPLE is a form of pari-mutuel wagering. Each bettor selects, in order, the first, second, and third placed horses in the designated TRIPLE race.

If there is a failure to select, in order the first three horses, payoff shall be made on TRIPLE tickets selecting the first two horses, in order; failure to select the first two horses, payoff to

TRIPLE tickets selecting the winner to win; failure to select the winner to win shall cause a refund of all TRIPLE tickets.

SIMILARITIES of TRI-3 and first part of TRI-3 DOUBLE

1. A new type wager offering.
2. Object: To select exact 3 positions on one ticket of one race.
3. Absent exact 3 positions winner of exact two positions.
4. Absent exact two positions winner of win position.
5. Played from a single three numbered ticket on one race the first time ever offered.

SIMILARITIES of the TRIPLE

1. A new type wager offering.
2. Object: To select exact 3 positions on one ticket of one race.
3. Absent exact 3 positions winner of exact two positions.
4. Absent exact two positions winner of win position.
5. Played from a single three numbered ticket on one race the first time ever offered.

The TRI-3 and TRI-3 DOUBLE expressions above are the exact wording as they appear in the copyrighted writing.

The TRIPLE expressions above are the exact wording as they appear in the Rules and Regulations of the New York Racing Association. § 4122.41 with words unrelated to the wager offering.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-516

LUCIO P. SALVUCCI,

Petitioner,

v.

THE NEW YORK STATE RACING ASSN., INC., NEW YORK CITY OFF-TRACK BETTING CORP., ROOSEVELT RACEWAY, INC.; and JOSEPH A. GIMMA, AS HE IS CHAIRMAN OF THE NEW YORK STATE RACING COMMISSION,

Respondents.

BRIEF OF RESPONDENT NEW YORK CITY OFF-TRACK BETTING CORPORATION IN OPPOSITION TO PETITION FOR CERTIORARI

W. BERNARD RICHLAND,
Corporation Counsel of the
City of New York,
Attorney for Respondent
New York City Off-Track
Betting Corporation,
Municipal Building
New York, N.Y. 10007.
(212) 566-3322 or 4337

L. KEVIN SHERIDAN,
LEONARD KOERNER,
of Counsel.

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TABLE OF CASES

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-516

LUCIO P. SALVUCCI,

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v.

THE NEW YORK STATE RACING ASSN., INC., NEW YORK CITY OFF-TRACK BETTING CORP., ROOSEVELT RACEWAY, INC.; and JOSEPH A. GIMMA, AS HE IS CHAIRMAN OF THE NEW YORK STATE RACING COMMISSION,

Respondents.

BRIEF OF RESPONDENT NEW YORK CITY OFF-TRACK BETTING CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

Were petitioner's ideas with respect to a particular method of betting, which ideas he had registered in the Office of the Register of Copyrights, copyrightable material?

STATEMENT OF THE CASE

(1)

Complaint:

This action was commenced pursuant to the United States Copyright Laws, §17 U.S.C. 101, et seq. (3).* The complaint alleges four counts of copyright infringement; each separately directed against one of the defendants (4-7). Prior to March 30, 1962, the plaintiff "put into words a creative expression of exotic wagering on horses or dogs entitled Tri-3 and Tri-3 double" (1).

TRI-3 is a "3 finish position play or wager on horses or dogs" where the object is to select correctly all finish positions, starting with the first, chosen finish po-

*Unless otherwise indicated, numbers not preceded by A in parentheses refer to pages in the Appellant's Appendix in the Court of Appeals. Numbers preceded by A refer to pages in the Appendix attached to the Petition for Writ of Certiorari.

sition of the bettor's TRI-3 ticket. If no one selects all three finish positions correctly, then the person getting the most consecutive correct finish positions starting with their first chosen finish position of their TRI-3 ticket is the winner (15).

TRI-3 Double "is a finish position play or wager consisting of positions 1, 2 and 3 in 2 races on horses or dogs" (12). The object is the same as TRI-3 except that the bettor must select correctly in both races (12). Winning tickets with the correct first three chosen positions for the first race must be exchanged by the bettor for selections in the second race (12).

Between March 30 and April 2, the plaintiff registered Tri-3 Double and Tri-3 as copyrighted works in the Office of the Registe of Copyrights (4, 10-12, 13-15).

After registering Tri-3 a[illegible] Tri-3

Double, the plaintiff presented his idea to each of the defendants (2-6). Thereafter, each of the defendants "infringed said copyright by using a material appropriation of plaintiff's sequential order of finish entitled Big Triple and Triple" (4, 16). The complaint also alleged that the defendants had engaged in unfair trade practices and unfair competition (id.). The complaint sought injunctive relief and damages (6-7).

Motions to dismiss and summary judgment

On August 22, 1975, the New York City Off-Track Betting Corporation filed an answer (17-19). On October 10, Roosevelt Raceway, Inc., joined issue (20-26).

On November 7, Roosevelt Raceway, Inc., moved to dismiss the complaint and for summary judgment. In support of the motion, George Levy, President of Roosevelt, submitted an affidavit. Roosevelt offers three

types of wagers: regular win, place and show selections; the "EXACTA", in which the bettor wins by selecting the horses in their exact order of first and second place positions and the "Triple" or Big Triple" by which the bettor wins by selecting the first, second and third horses in their exact order of finish (29-30, 33). The "EXACTA" was begun at Roosevelt on July 15, 1965 and the "Triple" or "Big Triple" was started on March 3, 1971 (30).

Mr. Levy stated that the "Triple" or "Big Triple" was an extension of the "EXACTA" (30). Roosevelt Raceway has never offered forms of wagering known as "TRI-3" and "TRI-3 Double" (30-31).

On November 7, The New York State Racing Association, moved for summary judgment (29). In support of the motion, Patrick W. O'Brien, Vice President of Operations of the

New York State Racing Association (NYRA), submitted an affidavit. NYRA, incorporated pursuant to Section 7902 of Title 21 of the Unconsolidated Laws of the State of New York, operates thoroughbred racing at Aqueduct, Belmont Park and Saratoga (52). The NYRA is supervised by the New York State Racing and Wagering Board (Board) (53). The Board regulates the use and conduct of parimutuel wagering in New York (53). The Board issues licenses to racing associations, corporations and publicly created off-track betting corporations (53). Only the forms of wagering approved by the Board can be used by its licensees (53). The Board has approved eight types of wagers, which include the "DAILY DOUBLE", the "EXACTA" and the TRIPLE (also called the Trifecta) (53-54). The types of wagers are set forth in the New York Code of Rules and Regulations,

volume 9(D), Subtitle T, Part 4011 and Part 4122 (58-74). The TRIPLE was authorized for thoroughbred racing on August 28, 1973, and for harness tracks on March 1, 1971 (54).

Mr. O'Brien stated that versions of the TRIPLE have been used in France since 1954 (55, 78, 80). Mr. O'Brien also stated that NYRA has never described the TRIPLE in the language utilized by plaintiff to describe his "TRI-3" or in any similar language (56).

On November 7, 1975, Joseph Gimma, Chairman of the New York State Racing Commission, also moved to dismiss or for summary judgment.

(2)

The District Court dismissed the complaint. It stated (A3a-5a):

"Pari-mutuel betting is controlled by statute in New York State-N.Y. Unconsoli-

dated Laws, §§7952, 7954 and 8008. Methods of betting at authorized establishments are sanctioned by the New York State Racing and Control Board. In addition to convencional betting at thoroughbred and harness race tracks, the Board has approved the Daily Double, Quinella, Exacta, Trifecta (sometimes called the Triple), and Superfecta.

The method of betting is not copyrightable. Novel and useful ideas may attain patent protection, but not copyright protection. In Baker v. Selden, 101 U.S. 99 (1880), plaintiff obtained a copyright on a book explaining a system of bookkeeping. The court dismissed the claimed copyright infringement noting:

> There is no doubt that a work on the subject of bookkeeping though only explanatory of well known systems, may be the subject of a copyright; but, then, it is claimed only as a book.... The novelty of the art or thing described or ex-

> plained has nothing to do with the validity of the copyright....
>
> ...The copyright of a book on bookkeeping cannot secure the exclusive right to make, sell and use account books prepared upon a plan set forth in such book.... 101 U.S. at 101-02, 104.

It is the manner of expression and not the idea itself which is copyrightable. L. Batlin & Son, Inc. v. Jeffrey Snyder, d/b/a J.S.N.Y. and Etna Products Co., Inc., No. 75-7308 (2d Cir. October 24, 1975) [on rehearing en banc, Court of Appeals reversed panel and affirmed the grant of a preliminary injunction restraining appellants from enforcing copyright, slip. op. p. 3202, dated (April 12, 1976)]; Roth Greeting Cards v. United Car Co., 429 F. 2d 1106 (9th Cir. 1970); Welles v. Columbia Broadcasting System, Inc., 308 F. 2d 810 (9th Cir. 1962). The instant copyrights attempt to protect the method of betting and are invalid.

Alternatively, should the complaint be interpreted as an infringement of the expression of the betting method, rather than the method itself, the court finds no genuine issue of fact exists since plaintiff's method of expression was never employed by defendants.

The limited copyright of the expression of the methods of betting was not infringed."

On April 21, 1976, the Court of Appeals affirmed the judgment on the opinion of the District Court Judge (A7a).

ARGUMENT

THE COMPLAINT WAS PROPERLY DISMISSED. THE PLAINTIFF'S SUGGESTION OF A METHOD OF BETTING THE TRI-3, AND THE TRI-3 DOUBLE IS AT MOST AN IDEA AND IS NOT COPYRIGHTABLE.

(1)

The Court of Appeals properly affirmed the District Court's dismissal of the plaintiff's complaint which alleged four counts

of copyright infringement, each separately, directly against the four defendants. The plaintiff alleged that he had registered with the United States Copyright Office two methods of betting called TRI-3 and TRI-3 Double and that, after registration, the defendants used these ideas and infringed plaintiff's copyrights.

Copyright registration confers no right at all to the conception reflected in the registered subject matter. A copyright gives no exclusive right to the act of idea disclosed; protection is given only to the expression of the idea not the idea itself. Mazer v. Stein, 347 U.S. 201, 217 (1954); Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F. 2d 738, 740 (9th Cir., 1971). See also, Roth Greeting Cards v. United Card Comp., 429 F. 2d 1106, 1109 (9th Cir., 1972); Nichols v. Universal Pictures Corp., 45 F. 2d 119, 121

121 (2d Cir., 1930), cert. den. 282 U.S. 902 (1930).

In Mazer v. Stein, supra, 347 U.S. 201 (1953), this Court, after reviewing the history of the copyright statutes and the scope of protection the statutes were intended to confer, stated (p. 217):

> "Unlike a patent, a copyright gives no exclusive right to the act disclosed; protection is given only to the expression of an idea - not the idea itself. Thus in Baker v. Selden, 101 U.S. 99, the Court held that a copyrighted book on a peculiar system of bookkeeping was not infringed by a similar book using a similar plan which achieved similar results where the alleged infringer made a different arrangement of the columns and used different headings. The distinction is illustrated in Fred Fisher, Inc. v. Dillingham, 298 F. 145, 151, when the court speaks of two men, each a perfectionist, independently making maps of the same territory. Though the maps are identical each may obtain the exclusive right to make copies of his own particular map and yet neither will infringe the others copyright."

Mazer and Baker v. Seldon, cited in the Mazer decision, establish the distinction between writings describing plans, methods or systems, which writings are subject to copyright protection, and the plans, methods or systems themselves, which are not subject to protection. This distinction was recognized in Briggs v. New Hampshire Trotting and Breeding Assn., Inc., 191 F. Supp. 234 (D.N. Hamp., 1960), which involved facts similar to the instant case. In Briggs, the plaintiff alleged that he was the author of a brochure which set forth a betting system and a method to process the betting system by using I.B.M. Machines. The plaintiff alleged that the defendant had introduced a similar system of betting in violation of his copyright and that the defendant had engaged in unfair competition. The District Court dismissed the complaint on

the ground, among others "that the statutes and court decisions give no protection by copyright to sports, games or similar systems as distinguished from publications describing them." 191 F. Supp. at pp. 236-237.

Prior to this proceeding, the plaintiff in the instant case commenced an action, alleging the same causes of action as alleged here, against the New Hampshire Jockey Club, Inc., and other defendants. On October 6, 1975, the District Court for New Hampshire, relying on Briggs v. New Hampshire Trotting and Breeding Association, Inc., 191 F. Supp. 234 (D.N. Hamp. 1960), dismissed the complaint. Salvucci v. New Hampshire Jockey Club, Inc., Dist. Ct., New Hampshire, Docket Nos. 75-223 and 75-224 affd. ___ F. 2d __ (1st Cir., 1976), docket number 75-1434, opinion dated March 1, 1976 (45-46).

The District Court had also properly found that, even if the plaintiff's method of betting could be protected as a form of expression under the copyright statute, the method was not used by the defendants. The plaintiff attached to his complaint a copy of two pages of a booklet of rules published by an off-track betting corporation. These two pages were alleged to be proof of each defendant's infringement. The pages describe the betting method called "The Triple." The description of "The Triple" is similar to that contained in the Rules of the New York State Racing and Wagering Board (61, 72). These descriptions are not similar to plaintiff's description. Such descriptions do not satisfy plaintiff's burden of proof, which, in a case where the subject matter involved allows

little variation in the form of its expression, requires a showing of appropriation in exact form of plagiarism. See Continental Cas. Co. v. Beardsley, 253 F. 2d 702, 705 (2d Cir., 1958), cert. den. 358 U.S. 816 (1958); Herbert Rosenthal Jewelry Corp. v. Kalpakian, 446 F. 2d 738, 742 (9th Cir., 1971).

(3)

Plaintiff alleged in his complaint that the defendants, in using his "Big Triple" idea had "been engaging in unfair trade practices and unfair competition against plaintiff to plaintiff's irreparable damage" (4). To sustain a cause of action for unfair competition or unfair trade practices, the plaintiff must show that the use of his idea by the defendants had a destructive effect on the plaintiff's competitive position. See Hygenic Specialties Co. v. H.G.

Salzman, Inc., 302 F. 2d 614, 620 (2d Cir., 1962); Blisscraft of Hollywood v. United Plastics Co., 294 F. 2d 694, 698 (2nd Cir., 1961); Fashion Two Twenty, Inc. v. Steinberg, 339 F. Supp. 836, 848 (E.D.N.Y., 1971).

Since the complaint does not allege that the plaintiff is in competition with the New York City Off-Track Betting Corporation or any of the other defendants, the plaintiff cannot establish that his competitive position was impaired by the defendants' actions and, therefore, he is not entitled to any relief based on that cause of action.

CONCLUSION

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

October 29, 1976.

Respectfully submitted,

W. BERNARD RICHLAND,
Corporation Counsel
of the City of New York,
Attorney for Respondent
New York City Off-Track
Betting Corporation.

L. KEVIN SHERIDAN,
LEONARD KOERNER,
of Counsel.

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-516

LUCIO P. SALVUCCI,

Petitioner,

—versus—

THE NEW YORK RACING ASSN., INC., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT, ROOSEVELT RACEWAY, INC.

JEROME BAUER, Esq.
Attorneys for Respondent
Roosevelt Raceway, Inc.
114 Old Country Road
Mineola, New York 11501

Of Counsel
MYRON AMER, Esq.
LEONARD H. KING, Esq.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT, ROOSEVELT RACEWAY, INC.

Opinions Below

The Memorandum or Decision and Order dated December 2, 1975, of the United States District Court for the Eastern District of New York (Petition at 2a-5a) has not been reported. The Order of the United States Court of Appeals for the Second Circuit is dated April 21, 1976, (Petition at 6a and 7a). Appellant's Motion for Rehearing was denied by the United States Court of Appeals for the Second Circuit.

Jurisdiction

Jurisdiction as set forth by Petitioner is contested. "Section 38 (117) of Title 17 U.S.C." and "Section 38 (114)" relied upon by Petitioner are non-existent. However, this Court does have jurisdiction under 28 U.S.C. Section 1254(1).

Question

Whether an idea is subject to copyright protection under the provisions of the Copyright Law of the United States Title 17 U.S.C.

Statement

This litigation is founded on a complaint that alleges ownership of copyrights to ideas for two complicated but unpatented betting systems titled "TRI-3 DOUBLE" and "TRI-3" (Petition at first two-thirds of page 9a).

In his complaint, plaintiff made allegations against all of the named defendants collectively without any regard to the differences that exists between the defendants or in the prior relationship of any of such defendants with plaintiff. For example, although petitioner alleges a prior relationship with the defendant, New York Racing Association, Inc. (Petition at 1a), he fails to point out to the Court that he had no such relationship with the defendant, Roosevelt Raceway, Inc. The result is to mislead the Court into believing that all defendants are in equal relationship with the petitioner when, in fact, they are not.

Defendant, Roosevelt Raceway, Inc., moved to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal

Rules of Civil Procedure for failure to state a claim upon which relief can be granted. Defendant Roosevelt Raceway, Inc. further moved for summary judgment on the ground there is no material triable issue of fact. Both motions by Defendant Roosevelt Raceway, Inc. were granted by the Trial Court who stated, "The method of betting is not copyrightable. Novel and useful ideas may attain patent protection, but not copyright protection." (Petition at 3a).

The Trial Court further stated (Petition at 4a and 5a):

> "It is the manner of expressing and not the idea itself which is copyrightable. L. Ratlir & Son, Inc. v. Jeffrey Synder, d/b/a J.S. and Etna Products Co., Inc. No. 75-7308 (2d Cir., October 24, 1975); Roth Greeting Cards v. United Car Co., 429 F.2d 1106 (9th Cir. 1970); Welles v. Colombia Broadcasting System, Inc., 308 F.2d 810 (9th Cir. 1962). The instant copyrights attempt to protect the method of betting and are invalid."
>
> "Plaintiff's copyrights were held invalid in Salvucci v. New Hampshire Jockey Club, No. 75-223 and 75-224 (D.N.H. October 6, 1975). The court is advised that the decision is on appeal."
>
> "Alternatively, should the complaint be interpreted as an infringement of the expression of the betting method, rather than the method itself, the court finds no genuine issue of fact exists since plaintiff's method of expression was never employed by defendants."
>
> "The limited copyright of the expression of the methods of betting was not infringed. Defendants' motions are in all respects granted, and it is SO ORDERED."

The judgment of the District Court for the Eastern District of New York was affirmed by the United States Court of Appeals for the Second Circuit (Petition at 6a and 7a). A Motion for Rehearing brought by the Appellant was denied by the United States Court of Appeals for the Second Circuit (Petition at 8a).

In unreported cases filed by the same plaintiff against New Hampshire Jockey Club, Inc., et al., Nos. 75-223 and 75-224 (D.N.H. October 6, 1975) similar motions of the defendants were granted by the District Court who said:

> "It has long been established that ideas cannot be protected by copyright."

The United States District Court for the District of New Hampshire was affirmed by the "Per Curiam" Memorandum and Order of the United States Court of Appeals for the First Circuit on March 1, 1976, and reported at 530 F.2d 1962 (1st Cir. 1976).

In the New Hampshire case, the plaintiff Salvucci petitioned this Court for a Writ of Certiorari. The petition was denied by this Court on October 4, 1976.

ARGUMENT

The decisions of the United States District Court for the Eastern District of New York and of the United States Court of Appeals for the Second Circuit are correct. They are in conformance with the same decisions made by the United States District Court for the District of New Hampshire and of the affirming opinion of the United States Court of Appeals for the First Circuit. The denial of the present plaintiff's petition for a Writ of Certiorari in his New Hampshire cases was without error and should be so followed in the present case.

Contrary to petitioner's contention, the United States District Court for the Eastern District of New York granting defendant's two motions and the affirmance of such decisions by the United States Second Circuit Court of Appeals, does not conflict with the copyright laws. In the present case, it is obvious that although the plaintiff may claim a copyright to a written work, he does not have a claim against the defendant Roosevelt Raceway, Inc. upon which relief can be granted. This decision by the District Court and its affirmance by the Second Circuit Court of Appeals does not raise any conflict with the copyright laws. At the same time, it is also true that there exists no material issue of fact upon which this case should go forward since plaintiff's copyrighted expression is not used by the defendant Roosevelt Raceway, Inc.

Plaintiff's citation of an alleged instance of access to his work by one of the named defendants cannot be imputed to the defendant Roosevelt Raceway, Inc. Yet, this is the gist of plaintiff's contention. He contends that because one respondent allegedly had access to his copyrighted work, all defendants-respondents had access to such work. Significantly the plaintiff has made no allegation that the defendant Roosevelt Raceway, Inc. had any access to the alleged copyrighted work or that such defendant uses or in any manner infringes upon such work.

It is clear that in an action for copyright infringement, plaintiff is required to show access to the alleged copyrighted work. In the absence of a showing of such access, a claim for copyright infringement cannot be sustained. *Christie* v. *Cohan*, C.C.A. N.Y. 1946, 154 F.2d 827, *cert. den.*, 67 S. Ct. 97, 329 U.S. 734, 91 L.Ed. 634; *Remick Music Corp.* v. *Interstate Hotel Co. of Nebraska*, D.C. Neb. 1944, 58 F. Supp. 523, *Aff'd*, 157 F.2d 744,

cert. den., 67 S. Ct. 622, 329 U.S. 809, 91 L.Ed 691, *rehearing den.*, 67 S.Ct. 769, 330 U.S. 854, 91 L.Ed. 1296.

Plaintiff's copyrighted works describe ideas of wagering all of which are old and in public domain. Title 17 U.S.C. Section 8 states:

> "No copyright shall subsist in the original text of any work which is in the public domain . . ."

Although publications describing a sport or a game may themselves be subject to copyright protection, there is no protection for the specific sport or game that is already in public domain. To grant such protection would give to the author of the publication a monopoly on such game or sport beyond the protection that he should be afforded for such published work. *Briggs* v. *New Hampshire Trotting and Breeding Association, Inc.*, 191 F. Supp. 234 (D.N.H. 1960). This is especially true for a game or sport that is disclosed to the public without the benefit of patent protection. *Affiliated Enterprises* v. *Gruber*, 86 F.2d 958, 961 (1st Cir. 1936); *Seltzer* v. *Sunbrock*, 22 F. Supp. 621, 630 (S.D. Cal. 1938).

The mere idea of wagering as suggested in plaintiff's copyrighted work is not and cannot be the subject of copyright nor is it protectible as such. *Baker* v. *Selden*, 101 U.S. 99 (1880).

Perhaps the simplest and most succinct statement of the law pertaining to the present case is found in *Dorsey* v. *Old Surety Life Insurance Company*, 98 F.2d 872, 873 (10th Cir. 1938) where the United States Tenth Circuit Court of Appeals said:

> "The right secured by a copyright is not the right to the use of certain words nor the right to employ ideas expressed thereby. Rather, it is the right to that arrangement of words which the author has selected to express his ideas."

It is clear that defendant Roosevelt Raceway, Inc. has not infringed upon the limited expressions of the copyright claimed by plaintiff. Accordingly, the decision of the lower courts should not be disturbed absent proof of access by defendant Roosevelt Raceway and its use of plaintiff's copyrighted work.

CONCLUSION

It is respectfully submitted that this petition for a Writ of Certiorari be denied as in the similar case involving the same plaintiff petitioner Salvucci v. New Hampshire Jockey Club, Inc., et al.

Respectfully submitted,

JEROME BAUER, Esq.
Attorneys for Respondent
Roosevelt Raceway, Inc.
114 Old Country Road
Mineola, New York 11501

Of Counsel:
MYRON AMER, Esq.
LEONARD H. KING, Esq.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

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LUCIO P. SALVUCCI,

Petitioner,

v.

THE NEW YORK RACING ASSN., INC., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT THE NEW YORK RACING ASSOCIATION INC. IN OPPOSITION

MILES M. TEPPER
Attorney for Respondent
The New York Racing Association Inc.
80 Pine Street
New York, New York 10005

Of Counsel:

CAHILL GORDON & REINDEL
O. Carlysle McCandless
Ira A. Finkelstein
80 Pine Street
New York, New York 10005

November 12, 1976

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT THE NEW YORK RACING ASSOCIATION INC. IN OPPOSITION

Opinions Below

The Memorandum of Decision and Order dated December 3, 1975 of the United States District Court for the Eastern District of New York (Petition at 2a-5a) has not been officially reported. The Order of the United States Court of Appeals for the Second Circuit dated April 21, 1976 affirming on the opinion of the District Court (Petition at 6a-7a) has not been officially reported. Petitioner's Motion for Rehearing was denied by the United States Court of Appeals for the Second Circuit in an order dated July 16, 1976 (Petition at 7a-8a) which has not been officially reported.

Jurisdiction

Although the statute is not cited by Petitioner, jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1).

Question Presented

Is a monopoly on the use of an idea for a type of wager on horse racing conferred by the copyrighting of a description of such wager? The courts below, on the basis of well-settled precedent, answered this question in the negative.

Statement

This litigation is one of several instituted by Petitioner against racetracks in New York, Vermont, New Hampshire and Massachusetts. Indeed, just last month, this Court denied a Writ of Certiorari to Petitioner in two companion actions similar to this one brought by him in the United States District Court for the District of New Hampshire against racetracks there whose dismissals had been affirmed by the United States Court of Appeals for the First Circuit. *Salvucci* v. *New Hampshire Jockey Club, Inc.*, No. 76-111, *cert. denied,* 45 U.S.L.W. 3227 (October 4, 1976).

Simply stated, Petitioner's contention is that by copyrighting a three-sentence description of a form of parimutuel wager which he calls "Tri-3", in which the bettor must select in sequential order the first three horses to finish in a single race, he has been granted a monopoly on the use of such wager, and that Respondents infringed upon his idea by actually conducting at their racetracks a similar form of wager known variously as the "Triple" or the "Trifecta". Petitioner alleges that in 1963 he showed

his single-page copyright to Respondent The New York Racing Association Inc. ("NYRA"). Approximately 10 years thereafter, in 1973, The New York State Racing and Wagering Board ("the Board") the state agency which supervises racing and parimutuel wagering in New York, first authorized NYRA and other private racetrack proprietors to conduct Triple wagering at their racetracks pursuant to a regulation of the Board. NYRA thereupon instituted Triple wagering at its Aqueduct, Belmont Park and Saratoga racetracks.

Petitioner instituted this action in August 1975, naming as defendants NYRA, Roosevelt Raceway, Inc., The New York City Off-Track Betting Corporation and the Chairman of the Board's predecessor agency. Several of the defendants moved not only to dismiss pursuant to F.R.C.P. Rule 12(b)(6) on the ground that the complaint failed to state a claim upon which relief can be granted but also for summary judgment under F.R.C.P. Rule 56. On December 3, 1975, the District Court, Honorable Jacob Mishler, Chief Judge, dismissed the complaint, holding that:

> "The method of betting is not copyrightable. Novel and useful ideas may attain patent protection, but not copyright protection. . . . It is the manner of expressing and not the idea itself which is copyrightable." (Petition at 3a, 4a)

Judge Mishler also granted summary judgment to defendants, holding alternatively that even were the complaint interpreted to allege

> "an infringement of the expression of the betting method, rather than the method itself, the court finds no genuine issue of fact exists since plaintiff's method of expression was never employed by defendants.

"The limited copyright of the expression of the methods of betting was not infringed." (Petition at 4a-5a)

The Court of Appeals affirmed on the opinion of the District Court (Petition at 6a-7a) and denied Petitioner's motion for rehearing (Petition at 8a).

ARGUMENT

The dismissals of Petitioner's actions in both the First and Second Circuit Courts of Appeals are clearly correct, based upon the long-established principle that ideas are not copyrightable. In the landmark case of *Baker* v. *Selden*, 101 U.S. 99 (1879), this Court held that plaintiff's copyright of a book explaining a particular system of bookkeeping did not extend to provide him with a monopoly of the use of the bookkeeping system itself; which may be conferred only by a patent:

"[W]hilst no one has a right to print or publish his book, or any material part thereof, as a book intended to convey instruction in the art, any person may practice and use the art itself which he has described and illustrated therein. The use of the art is a totally different thing from a publication of the book explaining it." (101 U.S. at 104)

See also Mazer v. *Stein*, 347 U.S. 201, 217 (1954); 1 *Nimmer on Copyright*, §§ 8.4, 8.5 (1976). The decision below falls squarely within the above principle and thus raises no important questions of Federal law.

Moreover, far from there being any conflict of decision among the Circuits, these precedents have formed the basis for an unbroken line of authority in the Federal courts. Thus, the United States Court of Appeals for the First

Circuit affirmed *per curiam* the dismissal of two actions similar to this one brought by Petitioner in the District of New Hampshire on the same ground as the dismissal in the present action, stating:

"[P]laintiffs find themselves unable to accept the fundamental difference between copyright and patent protection, although their case is a classic example or illustration of it." *Salvucci* v. *New Hampshire Jockey Club, Inc.*, No. 75-1434 (1st Cir., Mar. 1, 1976) (Unreported)

On October 4, 1976, this Court denied Certiorari. No. 76-111, 45 U.S.L.W. 3227. The same principle has been uniformly applied by the courts in other cases in which copyright protection was sought for the use of ideas, systems or games. Indeed, Petitioner is not the first to attempt to protect a wagering system under the copyright laws. A strikingly similar effort was rejected in *Briggs* v. *New Hampshire Trotting and Breeding Ass'n*, 191 F.Supp. 234 (D.N.H. 1960). The courts have consistently rejected efforts to obtain copyright protection for ideas for shorthand systems, *Brief English Systems, Inc.* v. *Owen*, 48 F.2d 555 (2d Cir.), *cert. denied*, 283 U.S. 858 (1931); card games, *Chamberlin* v. *Uris Sales Corp.*, 150 F.2d 512 (2d Cir. 1945); sweepstakes contests, *Morrissey* v. *Procter & Gamble Co.*, 379 F.2d 675 (1st Cir. 1967); lotteries, *Affiliated Enterprises, Inc.* v. *Gruber*, 86 F.2d 958 (1st Cir. 1936) and roller skating races, *Seltzer* v. *Corem*, 107 F.2d 75 (7th Cir. 1939); *Seltzer* v. *Sunbrock*, 22 F.Supp. 621 (S.D. Cal. 1938).

Further underscoring the distinction between patent and copyright protection is the fact that the form of wager which Petitioner's one-page copyright rudimentarily describes totally lacks any novelty. It is but a trivial and obvious variation of the Exacta, in which the first two horses to finish must be selected in order, and the Super-

fecta, in which the bettor attempts to select the first four horses in order. Petitioner makes no claim of entitlement as to either the Exacta or the Superfecta.

Petitioner's contrived claim that NYRA paraphrased his copyrighted expression is clearly without merit and is simply an effort to prevent Respondents from conducting the wager described. In the first place the excerpts from the description of the Triple which Petitioner incorrectly ascribes to NYRA in his appendix (Petition at 10a) are actually derived from a rule of the New York State Racing and Wagering Board authorizing the conduct of Triple wagering by harness racetracks. This is not even the Board rule pursuant to which NYRA, which operates thoroughbred tracks, conducts the Triple. Neither rule was ever published by NYRA.* Nevertheless, the courts below compared the claimed infringement with Petitioner's work and concluded that his method of expression was never employed by *any* of the defendants.

Petitioner cannot, as he is obviously trying to do, obtain copyright protection by virtue of the fact that the wagers described are so simple and basic that all descriptions of them must necessarily contain some similarity. The law is clear that similarity resulting from the fact that works deal with the same idea does not constitute infringement. *Morrissey* v. *Procter & Gamble Co., supra,* 379 F.2d at 678-79; *Chamberlin* v. *Uris Sales Corp., supra,* 150 F.2d at 513; *Affiliated Enterprises, Inc.* v. *Gruber, supra,* 86 F.2d at 961. Where, as here, the subject matter necessarily allows little variation in the form of its expression, there is a rigorous standard for proof of infringement, amounting to a required showing of appropriation in exact form or substantially so. *See, e.g., Continental*

*Petitioner never appealed from the dismissal by the District Court of his complaint as against the Board.

Casualty Co. v. *Beardsley,* 253 F.2d 702, 705-06 (2d Cir.), *cert. denied,* 358 U.S. 816 (1958); *Dorsey* v. *Old Surety Life Ins. Co.,* 98 F.2d 872, 874 (10th Cir. 1938); 2 *Nimmer on Copyright* § 143.11 at 626.2 (1976). As the courts below properly concluded, Petitioner has fallen far short of carrying this burden.

In short, the decisions below correctly rejected Petitioner's legal and factual claims and certainly raise no important questions of Federal law.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a Writ of Certiorari should be denied.

Respectfully submitted,

MILES M. TEPPER
Attorney for Respondent
The New York Racing Association Inc.
80 Pine Street
New York, New York 10005

Of Counsel:

CAHILL GORDON & REINDEL
O. Carlysle McCandless
Ira A. Finkelstein
80 Pine Street
New York, New York 10005

November 12, 1976